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No. 04-819

Supreme Court, U.S.
FILED
JAN 18 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SWIFT-ECKRICH, INC. d/b/a
CONAGRA REFRIGERATED FOODS,

Cross-Petitioner,

v.

UNITHERM FOOD SYSTEMS, INC.,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Cross-Respondent has no parent and there are no publicly held companies that hold any stock of the Respondent. Although not a Respondent herein, Jennie-O Foods, Inc., (now known as Jennie-O Turkey Store, Inc.) is a wholly owned subsidiary of Hormel Foods Corporation.

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1. CONAGRA'S PURPORTED CONDITIONAL CROSS-PETITION DOES NOT COMPLY WITH SUPREME COURT RULE 10.

ConAgra does not state, or even suggest, that there are "compelling reasons" to grant its Conditional Cross-Petition for a Writ of Certiorari.[1] Instead, ConAgra quarrels with the Federal Circuit's factual determinations and its references to the allegations in the pleadings. This is not the stuff of a petition for a writ of certiorari.

In Number 3 of its "Questions Presented", ConAgra appears to argue the merits of the question presented in Unitherm's Petition for Writ of Certiorari, to which ConAgra chose not to respond. What remains is the unequivocal fact that ConAgra did not make a post-verdict motion for JMOL to preserve sufficiency of the evidence for appellate review.[2] This is the question that cries out for resolution by this Court. Indeed, ConAgra apparently concedes the need to clarify this issue for the federal courts.[3]

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1. SUP. CT. R. 10 provides, in pertinent part: "A petition for writ of certiorari will be granted only for compelling reasons. * * *"

2. In its Conditional Cross-Petition (p. 3), ConAgra states: "ConAgra did not renew its motion to dismiss [sic] in a post-verdict motion for JMOL under Rule 50(b)."

3. ConAgra states: "It is time to revisit the question and hold that motions under the current Rule 50(b) are permissive and are not necessary to preserve rights of any kind on appeal." (Conditional Cross-Petition, p. 18).

2. THERE IS NO ISSUE AS TO UNITHERM'S STANDING TO SUE.

ConArga's antitrust standing argument is pure sophistry. ConAgra erroneously conflates issues and case citations relating to Constitutional Article III standing with statutory antitrust standing.[4] Section 4 of the Clayton Act provides a private remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws .. ."[5] Despite the unlimited scope of Section 4, courts have denied authority to sue to plaintiffs whose injury is merely derivative or remote. For example, shareholders of a corporation that has been injured by an antitrust violation have been denied standing to sue,[6] as have creditors or lessors of an injured entity.[7] It is a non-issue here. Unitherm fits precisely within the holding of *Walker*

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4. Contrary to ConAgra's suggestions, antitrust standing is not a jurisdictional issue and case law relating to "injury-in-fact" Article III standing is inapposite. *See Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Posner, J.). These concepts are legally and analytically distinct. *See New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 141-42 (D.D.C. 2002).

5. In *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948), this Court stated that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . the Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

6. *Sports Racing Servs. v. Sports Car Club of America*, 131 F.3d 874, 881 (10th Cir. 1997).

7. *Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971).

Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). Unitherm lost sales of its browning process because of ConAgra's enforcement of its fraudulently obtained patent on the identical process. Other suppliers of food browning systems were also unable to sell their products after ConAgra blanketed the industry with its threatening letters announcing its intention to aggressively enforce its patent on the browning process. (A 5140). The Federal Circuit noted that "ConAgra moved [by summary judgment] to have Unitherm's claim dismissed for lack of antitrust standing and Jennie-O's claim dismissed for lack of cognizable antitrust injury." (App. A p. 9a).[8] The point urged by ConAgra in the district court with reference to Unitherm was that ConAgra and Unitherm were not competitors, therefore Unitherm had no standing to complain. The district court ruled on the issue precisely, as noted by the Federal Circuit:

> The district court then ruled that Unitherm, but not Jennie-O, had antitrust standing because first, as ConAgra's direct competitor for sales of browning/smoking processes, Unitherm was susceptible to the types of injuries that the antitrust laws are supposed to prevent, and second, ConAgra's threats to enforce its patent could cause those injuries.

(App. A p. 9a).

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8. Jennie-O Foods Inc. (now known as Jennie-O Turkey Store, Inc.) is a vendor of turkey products to the trade. Jennie-O's only interest was in having ConAgra's patent invalidated on the grounds of prior sales and prior uses of the patented process. Jennie-O had incurred no damages.

The Federal Circuit treated standing as an issue to be determined as a matter of law, and antitrust injury as an "intensely factual" determination.[9] The issue of Unitherm's standing to sue, raised by ConAgra in its Motion for Summary Judgment and never at trial, resulted in the Federal Circuit reviewing the district court's summary judgment analysis on Unitherm's allegations, and holding:

> The district court was therefore correct in ruling that Unitherm had antitrust standing in allowing its action against ConAgra to proceed.

(App. A p. 44a).

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9. ConAgra's contention that courts cannot determine antitrust standing from the nature of the allegations contradicts the very authority it cites. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 (1986) ("[T]he lower courts, including the courts below, have found that under both § 16 and § 4 the plaintiff must still *allege* an injury of the type the antitrust laws were designed to prevent. We agree." (emphasis supplied)); *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 521, 545-46 (1983)

> The question presented is whether the complaint sufficiently alleges that the unions have been 'injured in [their] business or property by reason of anything forbidden in the antitrust laws' and may therefore recover treble damages under § 4 of the Clayton Act*** Accordingly, we hold that, based on the allegations of the complaint, the District Court was correct . . .

See also Blue Shield of Va. v. McCready, 457 U.S. 465, 471 (1982) (affirming the Fourth Circuit's holding that plaintiff's complaint "had alleged an injury within the meaning of § 4 of the Clayton Act and had standing to maintain the suit").

In its review of the sufficiency of the evidence, the Federal Circuit concluded that Unitherm's proof of antitrust *injury* was insufficient:

> The Tenth Circuit recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to *de novo* review. [Citing cases.] *Market definition and antitrust injury, on the other hand, are intensely factual determinations. See, e.g., Eastland Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482 (1992) ... We must therefore review the evidence supporting the jury's necessary findings of a relevant antitrust market and of antitrust injury.

(App. A at 13a, 14a) (emphasis supplied).

With reference to injury, the Federal Circuit noted that the trial court instructed the jury as follows:

> Jury Instruction No. 14 defined antitrust injury:
>
> Plaintiff must establish that it was injured as a result of defendant's alleged attempt to gain a monopoly ... to establish injury, plaintiff must prove that some damage flowed to Unitherm as a result of defendant's alleged attempt to gain a monopoly ... it is enough that plaintiff proves that the alleged attempt to gain a monopoly was a material cause of its injury.

(App. A at p. 10a).

ConAgra did not object to the instruction. The jury, thus instructed, found the facts under the evidence in favor of Unitherm. Without ever challenging the sufficiency of the evidence in the trial court at any time, ConAgra raised the point for the first time on appeal. The Federal Circuit determined there was insufficient evidence of causality and improperly sat in the jury box and reversed the verdict.

As discussed *infra*, ConAgra *never* brought these issues before the district court on a motion for judgment as a matter of law. Unitherm argued strenuously in the Federal Circuit that it was improper and unfair for the appellate court to review sufficiency of the evidence. ConAgra had not preserved these issues (or other elements of Unitherm's antitrust claim) for appellate review. Nevertheless, applying the minority view of the Tenth Circuit, the Federal Circuit proceeded to review sufficiency of the evidence (to Unitherm's detriment), in the absence of any Rule 50 motion by ConAgra.

3. THE *BRUNSWICK* AND *CARGILL* CASES HAVE NO APPLICATION TO THE ISSUES AT HAND.

ConAgra cites to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1976), and to *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), for the proposition that Rule 50 has no application to a review of jurisdiction based on standing to sue. As pointed out above, this is a smoke-screen. No such issue exists in this case. *Brunswick* was a merger case brought pursuant to Section 7 of the Clayton Act. Brunswick was a large bowling equipment manufacturer. When certain bowling alley centers defaulted on paying Brunswick for equipment, Brunswick acquired them so the centers could continue in operation. The plaintiffs were bowling alley centers that competed with the failing

bowling centers acquired by Brunswick. The plaintiffs alleged as damages the profits they would have made had the acquired centers been closed. In short, plaintiffs were aggrieved because they continued to face competition. This Court stated:

> Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares.

Id. at 709.

This Court simply asserted the well-settled rule that the antitrust laws condemn anti-competitive effects, not *pro-competitive* effects. The plaintiffs did not allege the kind of injury the antitrust laws were designed to prevent. "[I]t follows that, petitioner is entitled, *in accord with its motion made pursuant to Rule 50(b)*, to judgment on the damages claim notwithstanding the verdict." *Id.* at 713 (emphasis supplied). By contrast, ConAgra's enforcement of its fraudulent patent destroyed competition in the market for browning processes - an injury directly caused by ConAgra's antitrust violation. Moreover, unlike Brunswick, ConAgra never raised the issue in a Rule 50(b) motion.

The plaintiff in *Cargill* sought an injunction under Section 16 of the Clayton Act, to enjoin a merger that would increase, not reduce, competition. As in *Brunswick*, this Court observed that "a showing of loss or damage due merely to increased competition does not constitute [antitrust] injury." *Cargill*, 479 U.S. at 122. There has never been any contention that ConAgra's enforcement of its bogus patent *increased*

competition. *Brunswick* and *Cargill* are utterly beside the point urged by Unitherm.[10]

4. A MOTION UNDER RULE 50(b) IS REQUIRED TO PRESERVE SUFFICIENCY OF THE EVIDENCE FOR APPELLATE REVIEW OF A JUDGMENT ON A JURY VERDICT.

ConAgra contends that a Rule 50(b) motion is not required "to preserve the full range of rights on appeal when a pre-verdict motion is made under Rule 50(a)." (Conditional Cross-Petition, p. 14). ConAgra cites no authority for this proposition. Indeed, ConAgra's argument violates Supreme Court Rule 15.2 as it is an untimely response to Unitherm's Petition for a Writ of Certiorari.

Again, ConAgra is not forthcoming in its description of the issue. The issue upon which the Federal Circuit reversed the jury's verdict on Unitherm's antitrust claim was the sufficiency of the evidence. As to *this* issue, eight of the federal circuits squarely hold that a Rule 50(b) motion is mandatory for appellate review. "It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court." 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed.

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10. ConAgra states that there was no "post-trial motion" in *Cargill*. (Conditional Cross-Petition, p. 12). Unitherm can find no indication in this Court's opinion in *Cargill* whether there was or was not a post-trial motion. But it is a non-sequitur in any event because Rule 50 only applies to sufficiency of the evidence issues in *jury trials*. Rule 50(a) provides in pertinent part: "If during *a trial by jury* a party has been fully heard on an issue and there is no legally *sufficient evidentiary basis* . . ." *Cargill* was a bench trial.

1994). Of course, errors at the trial, duly objected to, dealing with matters other than sufficiency of the evidence may be raised on appeal without the necessity of a Rule 50 motion in the trial court. *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994) (a Rule 50 motion deals only with sufficiency of the evidence, rather than questions of law generally).

Furthermore, Unitherm pointed out in its Petition for a Writ of Certiorari (footnote 4, pp. 6-7) that ConAgra did *not* make a Rule 50(a) motion contesting the sufficiency of the evidence on the elements of Unitherm's antitrust claim. ConAgra seriously misstates the record when it states that it made such a motion. (Conditional Cross-Petition, p. 15).[11] The *only* statement ConAgra's counsel made that even arguably made reference to Unitherm's antitrust claim was to express his doubt about the sufficiency of the evidence to prove an intent to deceive the patent office:[12]

> Well, now the plaintiff is now in, or plaintiff's case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that inference.

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11. ConAgra states: "In this case, ConAgra did move, under Rule 50(a), for dismissal of the antitrust claim at the close of the evidence and was not required to make that motion again under Rule 50(b) to preserve its right to appeal." Not so.

12. Proof that ConAgra obtained its patent by committing fraud on the patent office was an element of Unitherm's *Walker Process* claim under Section 2 of the Sherman Antitrust Act, and also an element of Unitherm's claim of tortious interference under Oklahoma common law.

(A 5237).[13] That is the sum total of ConAgra's "motion for directed verdict" arguably on Unitherm's antitrust claim made at the conclusion of Unitherm's case in chief.[14] The Tenth Circuit law set forth in *Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004), holds that the moving party must include all issues challenged and must *specify* the basis for its motion:

> The motion must include *all issues challenged*, as the 'failure to move for directed verdict [now judgment as a matter of law] *on a particular issue will bar appellate review of that issue.*
>
> * * *
>
> In this case, the Cummings moved for judgment as a matter of law with regard to the defense of misuse only and requested a jury instruction on this issue. Counsel did not move for judgment as a matter of law with regard to GM's liability generally . . . Although technical precision is not required, *the moving party must adequately notify the court of*

13. Even as to fraudulent intent the comment by ConAgra's counsel was clearly not a specification of "the law and the facts on which the moving party is entitled to judgment" as required by Rule 50(a).

14. ConAgra also seriously misstates the record when it impugns the trial judge by saying she "several times expressed her desire not to hear further about ConAgra's position on the deficiencies of the antitrust claim." (Conditional Cross-Petition, p. 16). On the contrary, the trial judge allowed ConAgra's counsel to make a lengthy argument for directed verdict, but ConAgra's counsel directed his argument only to Unitherm's claims under Oklahoma common law. (A5232-5237). ConAgra's counsel never mentioned the word "antitrust" in his argument, and the only statement he made that could even arguably apply to Unitherm's antitrust claim was the one quoted above.

> *the issues being raised in order to satisfy the purposes of the Rule. The plaintiffs' motion was limited to a motion for judgment as a matter of law on the issue of misuse and therefore any appeal is so limited.*

365 F.3d at 949-50 (emphasis supplied).

ConAgra's complaints about sufficiency of the evidence on the issues of relevant market and antitrust injury were raised for the first time on appeal. ConAgra did not alert Unitherm or Judge Cauthron to these purported deficiencies at the time Unitherm had an opportunity to rectify them. ConAgra's failure to comply with Rule 50 perpetrated unfairness on Unitherm and on the trial court.

While ConAgra failed to make a proper Rule 50(a) motion regarding Unitherm's antitrust claim, Unitherm's Petition for a Writ of Certiorari is directed to ConAgra's *admitted* failure to make a Rule 50(b) motion to preserve sufficiency of the evidence for appellate review. This is the issue that clearly divides the federal circuits and that flies in the face of this Court's strong *dicta* in the *Cone*, *Johnson*, *Neely* and *Weisgram* cases cited by Unitherm in its Petition for a Writ of Certiorari.

ConAgra argues that Rule 50(b) is merely "permissive" because it provides that a party "may" renew its motion no later than ten days after entry of judgment. (Conditional Cross-Petition, p. 14). Of course, no one can *force* the loser of a jury verdict to renew a motion for judgment as a matter of law after entry of judgment. *See* 9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE, § 50.41 (3d ed. 2004). As noted above, if the loser is appealing on grounds other than the sufficiency of the evidence, such motion is not required. But it is a prerequisite

for appellate review of sufficiency of the evidence in eight federal circuits, and should be a prerequisite as a matter of federal jurisprudence nationally. As the Tenth Circuit noted in *Cummings*, ". . . the vast majority of other circuits have held that the failure to renew a motion for judgment as a matter of law following a jury verdict precludes an appellate court from reviewing sufficiency of the evidence." 365 F.3d at 950 n.1. In its Petition for a Writ of Certiorari, Unitherm cited *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), and *Johnson v. New York, New Haven and Hartford R.R. Co.*, 344 U.S. 48 (1952), for the proposition that Rule 50 requires a post-verdict motion for JMOL to preserve sufficiency of the evidence for appellate review. ConAgra states that these "older cases on which Unitherm relies held that a renewal of a pre-verdict motion was not required to preserve the right to a re-trial, only to preserve the right to a reversal." (Conditional Cross-Petition, p. 18). *Cone* and *Johnson* hold no such thing. In both cases, the losing party had moved for directed verdict and moved post-verdict for a new trial or to set aside the jury verdict. The courts of appeals had found the Plaintiff's evidence insufficient and directed judgment be entered for Defendant. This Court held that the appellate court could not direct entry of a judgment for defendant in the absence of a post-verdict motion for j.n.o.v. There was no ruling whatsoever of the kind described by ConAgra. Unlike a motion for judgment as a matter of law, which can be made "during a trial" when a party has been "fully heard", a motion for new trial can, by definition, only be made "after entry of the judgment." *See* FED R. CIV. P. 59(b).[15]

Furthermore, ConAgra's statement in its footnote 11 (Conditional Cross-Petition, p. 18) that, "The views expressed

15. Sufficiency of the evidence challenges are properly raised by motion for JMOL, while other rulings on evidence may be assigned as grounds for a new trial. *Weisgram*, 528 U.S. at 453 n.9.

in those cases were not, however, included in the current Rule 50, when it was completely rewritten and adopted by this Court in 1963", is similarly baffling. In *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), this Court stated:

> As the Advisory Committee explained, these 1963 amendments were not intended to 'alter the effects of a jury verdict or the scope of appellate review,' *as articulated in the prior decisions of this Court*.

Id. at 324 (emphasis supplied).

After citing to *Cone*, *Johnson*, and *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), this Court stated:

> The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved.

386 U.S. at 325.

This Court's emphasis on the necessity for *strict compliance* "with the procedural requirements of Rule 50(b)" can only lead, Unitherm submits, to the conclusion that failure to make a Rule 50(b) motion precludes an appellate court from reviewing sufficiency of the evidence. *See also Weisgram*, 528 U.S. at 549. Nothing about the 1963 amendments to Rule 50 had any effect on the holdings of this Court in the cases cited by Unitherm.

CONCLUSION

The foregoing considered, ConAgra's Conditional Cross-Petition for a Writ of Certiorari should be denied and Unitherm's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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